No. 03-1397 (3)

IN THE
Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 7 - 2004
OFFICE OF THE CLERK

CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, MONTE DE SION (MOUNT ZION) CHURCH, AND CIVIL LIBERTIES FOR URBAN BELIEVERS,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF AMERICAN JEWISH CONGRESS; BAPTIST GENERAL CONFERENCE; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; EVANGELICAL LUTHERAN CHURCH IN AMERICA; GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH; CLIFTON KIRKPATRICK, AS THE STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.); GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; FIRST JURISDICTION OF ILLINOIS, CHURCH OF GOD IN CHRIST; FOUNDATION FOR THE PRESERVATION OF THE MAHAYANA TRADITION, INC.; INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL; UNION OF MESSIANIC JEWISH CONGREGATIONS; AND WORLDWIDE CHURCH OF GOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

VON G. KEETCH*
ALEXANDER DUSHKU
MATTHEW K. RICHARDS
KIRTON & MCCONKIE
60 East South Temple
Suite 1800
Salt Lake City, Utah 84145
(801) 328-3600

Counsel for Amici Curiae

* Counsel of Record

May 7, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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Amici curiae American Jewish Congress; Baptist General Conference; The Church of Jesus Christ of Latter-day Saints; Evangelical Lutheran Church in America; General Council on Finance and Administration of the United Methodist Church; Clifton Kirkpatrick, as the Stated Clerk of the Presbyterian Church (U.S.A.); General Conference of Seventh-day Adventists; First Jurisdiction of Illinois, Church of God in Christ; Foundation for the Preservation of the Mahayana Tradition, Inc.; International Church of the Foursquare Gospel; Union of Messianic Jewish Congregations; and Worldwide Church of God respectfully request leave of this Court to file the following brief in the above-captioned matter. In support of this motion, *amici curiae* state as follows:

The petitioners have granted their written consent to the filing of briefs *amici curiae*, which consent is on file with this Court. The United States, which is listed on this Court's docket as a respondent, has also consented to the filing of this brief. Respondent City of Chicago has withheld its consent, necessitating this motion.

Amici are national and regional religious organizations, with millions of members, that support an interpretation of the Free Exercise Clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc ("RLUIPA"), which provides meaningful protections for religious land uses. *Amici* are concerned that the decision below, which sets an excessively high threshold for bringing free exercise and RLUIPA claims, will have nationwide adverse consequences on the ability of religious organizations to construct houses of worship and religious instruction. Accordingly, *amici* support the petition for a writ of certiorari.

As religious organizations whose members or affiliates depend on religious meetinghouses for the exercise of their respective religions, each of the *amici* also has a direct and vital interest in the proper interpretation and application of

constitutional and statutory protections for religious land uses. The specific interests of the *amici* are set forth in the addendum to the brief.

For the foregoing reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

VON G. KEETCH*
ALEXANDER DUSHKU
MATTHEW K. RICHARDS
KIRTON & MCCONKIE
60 East South Temple
Suite 1800
Salt Lake City, Utah 84145
(801) 328-3600

Counsel for Amici Curiae

* Counsel of Record

May 7, 2004

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INTEREST OF THE *AMICI*[1]

The interest of the *amici* is set forth in the accompanying motion for leave to file and in the addendum to this brief.

REASONS FOR GRANTING THE PETITION

Religious organizations seeking to construct or renovate religious meetinghouses often experience unreasonable hostility and opposition from local land use bodies. The biggest problem is land use standards that grant regulators virtually limitless discretion to reject religious land uses for wholly arbitrary or even invidious reasons, coupled with extremely deferential standards of judicial review. In response to this nationwide problem, Congress enacted RLUIPA to subject discretionary land use decisions to meaningful judicial review. *Amici* and numerous other religious land users depend heavily on RLUIPA's protections.

The decision below will have nationwide adverse consequences on the ability of religious organizations to construct houses of worship. As demonstrated in the petition and in Judge Posner's dissent below, the Seventh Circuit's decision, in conflict with other decisions around the country, makes it unreasonably difficult for a religious body to challenge a land use measure under equal protection principles. *Amici* agree with Judge Posner on this point and urge the Court to grant review of that issue.

The other issue presented, however, is of even greater practical significance, and will therefore be the focus of this brief. Specifically, the decision below creates such a high standard for establishing when land use decisions impose a substantial burden on religious exercise that the protections of

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[1] Counsel for *amici* state that they authored this brief in whole and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

the Free Exercise Clause and RLUIPA would often be rendered meaningless. As demonstrated below, this standard conflicts with the decisions of other circuits and lower courts, is contrary in principle to this Court's prior decisions and teachings, and violates the express intent of Congress in enacting RLUIPA. *Amici* urge this Court to grant the petition to resolve these conflicts and to reaffirm a substantial burden test consistent with this Court's prior free exercise jurisprudence and the stated purpose of RLUIPA.

I. THIS COURT'S REVIEW IS NEEDED BECAUSE THE DECISION BELOW SEVERELY UNDERMINES VITAL CONSTITUTIONAL AND STATUTORY PROTECTIONS FOR RELIGIOUS LAND USE.

A. Discriminatory and Arbitrary Land Use Regulations Create Significant Religious Hardships.

1. The right to worship God according to one's own conscience is fundamental. For tens of millions of Americans, "worship" means worship in community – in chapels, synagogues and other religious meetinghouses, in the communion and strength of fellow believers. In many faiths, vital elements of worship can only be experienced in community. A sermon or homily has little significance without an audience. Religious ceremonies and sacraments are usually performed in a communal context. Prayer meetings, Bible study sessions, and religious choirs are but a few of many examples of group worship and religious exercise. As believers worship together, religious exercise acquires meaning and significance that transcend the individual.

The ability to erect religious meetinghouses where communities of faith may gather and worship is therefore indispensable to religious liberty. "The physical embodiment of a religious group – its church – represents its ability to

speak, assemble, and worship together: three fundamental rights embodied in the First Amendment." Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices* [hereinafter "Storzer & Picarello"], 9 Geo. Mason L. Rev. 929, 945 (2001). As Congress found in enacting RLUIPA, "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. S7774 (daily ed. July 27, 2000).

When land use regulators prohibit or significantly constrain the construction or renovation of a house of worship, they often impose considerable religious hardships. This may be true because the prohibition results in people literally having no place to worship; in such instances, the land use regulation is a direct prohibition on the free exercise of religion. But religious hardship can also arise where regulatory obstacles bar the construction or expansion of a house of worship that is necessary to alleviate overcrowding, reasonably accommodate new members, or enable certain religious practices.

The mere fact that it is physically possible for current and prospective members of a church[2] to cram into an existing or makeshift meetinghouse does not imply that denying the right to build or adequately expand a house of worship creates no hardship. Overcrowding can be a significant impediment to religious exercise. Lack of seating in the main sanctuary inevitably forces some congregants to stand in foyers and hallways, precluding direct participation in worship services. Essential religious courses cannot be taught to everyone interested. Prospective members become discouraged because the congregation has no room for them. Parents lack

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[2] The term "church" is used inclusively to refer to religious organizations generally, whether Christian, Jewish, Muslim, Buddhist, Hindu, etc.

adequate space to care for restless children. The quality of services and the contemplative atmosphere conducive to worship suffer.

Similarly, the design of churches is "freighted with religious meaning," and particular liturgies require particular building designs. *First Covenant Church* v. *Seattle*, 840 P.2d 174, 182 (Wash. 1992); *Society of Jesus of New England* v. *Boston Landmarking Comm.*, 564 N.E.2d 571, 573 (Mass. 1990). Such features as the sanctuary, altar, steeple, counseling rooms, and classrooms all are critical to religious practice. Restricting the construction or expansion of churches to preclude any of these necessary features can greatly burden religious exercise. In brief, substantial religious hardships often arise when regulators significantly constrain a church's ability to construct adequate facilities.

2. Municipal land use regulators are often hostile toward religious land uses, or at a minimum insensitive to the religious hardships just described. In the experience of these *amici*, discriminatory and arbitrary treatment of religious land uses by municipalities poses significant obstacles to religious exercise. Religious organizations of all faiths face widespread and increasing pressure by municipal authorities nationwide to limit their physical presence in America's cities and towns. See, *e.g.*, Storzer & Picarello, 9 Geo. Mason L. Rev. at 929.

Prior to the enactment of RLUIPA, during nine hearings over three years, Congress amassed substantial evidence of pervasive religious discrimination and violations of free exercise rights in the land use area, especially in respect to minority faiths. As summarized by Senators Kennedy and Hatch in their Joint Statement in support of RLUIPA:

> The hearing record compiled massive evidence that this right [freedom to worship] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated

against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.

Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan." Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks – in all sorts of buildings that were permitted when they generated traffic for secular purposes.

The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical – from national surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal, with examples from all over the country. Some of it is testimony by witnesses with wide experience who say that the anecdotes are representative. This cumulative and mutually reinforcing evidence is summarized in the report of the House Committee on the Judiciary (House Rep. 106-219) at 18-24, in the testimony of Prof. Douglas Laycock to the Committee on the Judiciary 23-45 (Sept.

9, 1999), and in Douglas Laycock, State RFRAs and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 769-83 (1999).

146 Cong. Rec. S7774.[3]

In addition to laws with an overtly anti-religious purpose, congressional hearings uncovered many ostensibly benign land use laws that are systematically applied to reach anti-religious results. For example, a survey of twenty-nine zoning codes from suburban Chicago indicated that in twelve of these codes churches (unlike other assembly uses) could not locate *anywhere* as of right without a special use permit, giving regulators wide discretion over religious land use.[4] Witnesses repeatedly testified about regulators barring churches from worshipping in buildings previously used by non-religious assemblies and of instances where non-religious assemblies were not subject to the same restrictions.[5]

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[3] *See also* H.R. Rep. No. 106-219, at 17-24 (1999) (summarizing hearing testimony); *see generally* Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998); *see also Guru Nanak Sikh Soc'y of Yuba City* v. *County of Sutter*, No. Civ. S-02-1785, slip op. at 43 (E.D. Cal. Nov. 19, 2003) (relying on the Joint Statement); *Murphy* v. *Zoning Comm'n of Town of New Milford*, 289 F.Supp.2d 87, 118 (D. Conn. 2003) (same); *Freedom Baptist Church of Delaware Cnty* v. *Township of Middletown*, 204 F.Supp.2d 857, 861-63 (E.D. Pa. 2003) (same).

[4] *See* H.R. Rep. No. 106-219, at 18; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); Douglas Laycock, *State RFRAs and Land Use Regulation* [hereinafter "Laycock"], 32 U.C. Davis L. Rev. 755, 773-74 (1999) (summarizing congressional record; Laycock's article was incorporated into the congressional record at 146 Cong. Rec. S7774).

[5] H.R. Rep. No. 106-219, at 19, 21, 23; *Life Teen, Inc.* v. *Yavapi County*, No. Civ 01-1490, slip op. at 32 (D. Ariz. Mar. 26, 2003) ("Congress found that the vague, discretionary, and subjective standards applied to land use decisions resulted in widespread discriminatory application of land use regulations to religious assemblies.").

Congress found that some municipalities totally exclude new churches by cleverly authorizing religious uses only in places where churches already exist. Thus, "[t]he code shows multiple sites for churches but in fact all new churches are totally excluded." Laycock, 32 U.C. Davis L. Rev. at 773-74; H.R. Rep. No. 106-219, at 19.

Congress also found, as the First Circuit recently summarized, the increasingly common "phenomenon of churches being unwanted either in residential areas – because of increased traffic or noise, or impact on aesthetics – or in business zones – because tax-exempt churches dampen the vibrancy of commercial development." *Boyajian* v. *Gatzunis*, 212 F.3d 1, 8 (1st Cir. 2000). Opposition to new churches in residential zones is of course familiar. For example, Congress heard about *Orthodox Minyan of Elkins Park* v. *Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Commw. 1989), where the zoning board denied an application of an Orthodox Jewish congregation because the proposed building lacked parking spaces – even though such spaces were unnecessary since Orthodox Jews do not drive on the Sabbath – but when the congregation amended its proposal to include added spaces, the board again denied the application because it would generate too much traffic. H.R. Rep. No. 106-219, at 23. But Congress also found that "increasing numbers of the recent cases involve opposition to churches in commercial zones, or even industrial zones" because officials oppose taking such lands off the tax rolls. Laycock, 32 U.C. Davis L. Rev. at 761. As Professor Laycock has noted, the "practical effect [of this] is continuous opposition to any new places of worship, with local officials offering real or imagined or wholly phony land use concerns as a subterfuge to fight the state legislature's policy of tax exemption," resulting in "widespread political and governmental opposition to the exercise of a core First Amendment right." *Id.* at 761-62.

Independent studies have confirmed these problems and the religious hardships they impose. One study demonstrated an overwhelming, nationwide pattern of discrimination in zoning decisions involving small religious groups. *Id.* at 770-71; see Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise*, 32 U.C. Davis L. Rev. 725, 731 (1999) (describing study: fully one-half to two-thirds of reported cases involve minority religions). As Congress found, new, unfamiliar, and minority faiths are particularly vulnerable to unconstitutional treatment at the hands of land use regulators. See *supra* 146 Cong. Rec. S7774. And yet every denomination is in the minority somewhere in the country and thus vulnerable to such treatment. One survey demonstrated that arbitrary land use treatment is far more prevalent, even with respect to familiar mainline denominations, than the case law suggests, with reported cases being just the "tip of the iceberg." Laycock, 32 U.C. Davis L. Rev. at 772-73.

3. Based on their on-going experience with numerous land use bodies across the nation, *amici* can attest that congressional concerns about religious hardships arising from discriminatory and arbitrary treatment of religious land uses were well founded. Too frequently *amici* encounter outright anti-religious bias and discrimination, sometimes directed toward religious land uses generally and sometimes directed specifically at our particular faith communities. Occasionally that bias is overt and easily discernable, but most often it is difficult to prove even when clearly present; local land use bodies are usually too sophisticated to include evidence of their own bias in the record. As one court accurately noted:

> Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire

> hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.

Am. Friends of the Soc'y of St. Pius v. *Schwab*, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979). Where residential zones are at issue, *amici* have found that land use officials commonly undervalue the religious needs of churches and dramatically overvalue the minor, even trivial, concerns of neighbors who oppose anything but purely residential development.

Amici can also confirm congressional findings that municipalities increasingly seek to exclude churches from commercial and industrial zones as allegedly inconsistent with their business development and tax collection agendas. Land use officials often fight tooth and nail to hinder the construction or expansion of much-needed houses of worship, whether in residential, commercial, or industrial districts. Two representative examples illustrate the types of obstacles *amici* routinely face.

a. *The Church of Jesus Christ of Latter-day Saints.* In 2002, after an extensive search for appropriate property, the Church of Jesus Christ applied to build a 16,558 sq. foot meetinghouse on a 3.85-acre parcel in a residential area of the City of West Linn, Oregon. The Church needed the meetinghouse because its West Linn members had no place within city limits to worship and because the meetinghouse in the neighboring city had become very overcrowded. The Church designed the building to specifically address the religious needs of its local members; literally every element of the building was necessary for religious worship, instruction, or ministry. Under city zoning law, houses of worship are not permitted outright anywhere in the city but are conditional uses. The proposed church complied with all objective zoning standards and land use regulations pertaining to size, height, parking, and so forth, and the Church repeatedly expressed its willingness to comply with any

reasonable requirement to mitigate subjective aesthetic and design concerns. After the Church agreed to extensive landscaping and other conditions, the city's professional planning staff recommended granting a conditional use permit.

However, implacable neighborhood opposition arose to any Church meetinghouse on the property. The city rejected the planning staff's recommendation and denied the application despite the Church's religious needs. Officials based their decision on amorphous and wholly subjective criteria, such as that the proposal did not provide "adequate area for aesthetic design treatment." See *Corporation of the Presiding Bishop* v. *City of West Linn*, 86 P.3d 1140, 1142 (Or. App. 2004).

b. *Vision Church, United Methodist.* In 2000, Vision United Methodist Church, a predominantly Korean congregation, purchased a vacant 27-acre parcel in a relatively rural suburban area of unincorporated Lake County, Illinois, just outside the Village of Long Grove. Because many of its members lived near Long Grove and its current meetinghouse was too small, the Church sought to construct a new house of worship on the parcel. Village planners led the Church to believe it could easily obtain land use approval, so the Church applied for Village annexation of the property, an appropriate zoning designation, and permission to build. However, opposition from Village officials and citizens, some of it laced with thinly veiled racial slurs and innuendos, was intense and the application was rejected. Land use officials questioned whether it was proper for a church comprised primarily of non-residents to be located in their Village.

The Church then applied to Lake County for the requisite land use approvals. But when County approval was imminent, the Village changed course and forcibly annexed the land. The Village then amended its zoning ordinance to preclude construction of any kind of church on the parcel. The amendment also had the effect of preventing the Church from constructing its church anywhere in the Village. As a

result, Church members were forced to share worshiping space in an old and cramped facility already used by another congregation, preventing many of its planned ministries and religious activities. See *Vision Church, United Methodist* v. *Village of Long Grove*, No. 03 C 5761 (N.E. Ill. 2003).

B. The Decision Below Sets the Threshold for Finding a Substantial Burden So High that the Protections of the Free Exercise Clause and RLUIPA Are Often Rendered Meaningless.

In response to these types of problems, Congress unanimously passed and President Clinton signed RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000), codified at 42 U.S.C. §§ 2000cc to 2000cc-5. RLUIPA protects religious land use from discriminatory and arbitrary treatment by subjecting discretionary land use decisions that substantially burden the exercise of religion to strict scrutiny. See *id.* RLUIPA also requires that its provisions be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

RLUIPA's substantial burden test was primarily intended to weed out tenuous claims based on minor or incidental burdens that are inherent in any land use system, while still preserving a remedy for claims involving actual religious hardship. Although RLUIPA defines religious exercise to include the construction or use of a house of worship, 42 U.S.C. § 2000cc-5(7), it does not specify what qualifies as a "substantial burden" on the exercise of religion. Nevertheless, Congress clearly intended that term to be interpreted in accordance with this Court's past decisions. See 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000).

The substantial burden test has a significant pedigree in this Court's free exercise jurisprudence and in other decisions applying the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. As explained in greater

detail below, this Court has always defined substantial burden to include cases of bona fide religious hardship – where state action makes religious exercise significantly more difficult or costly. (See *infra*, Section II.C.) To be sure, the precise rubric for determining substantial burden has varied in this Court's decisions.[6] But this Court has never conditioned judicial review under the Free Exercise Clause on the state barring a religious practice or making it effectively impossible, and it is clear that Congress did not intend to adopt so high a standard when it passed RLUIPA.

Nevertheless, the Seventh Circuit has established an extremely exacting substantial burden standard. The decision below requires that the challenged land use regulation "necessarily bear[] direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." Pet. App. 13a. Hence, even though the burden imposed by the Chicago ordinance at issue here was, as Judge Posner noted, "formidable" and "severe" (*id.* at 35a (Posner, J., dissenting)), under the Seventh Circuit's standard it would still be insufficient to constitute a substantial burden under RLUIPA. Indeed, the standard adopted below is so difficult for churches to satisfy that it renders federal protections for religious land uses almost meaningless, leaving churches defenseless in the face of the very arbitrariness and discrimination Congress intended RLUIPA to remedy. Unfortunately, the Seventh Circuit's approach to substantial

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[6] The variety of formulations this Court has used has engendered some confusion in the lower courts. For example, the Eleventh Circuit recently observed that "[t]he Court's articulation of what constitutes a 'substantial burden' has varied over time." *Midrash Sephardi, Inc.* v. *Town of Surfside*, ___ F.3d ___, 2004 WL 842527, *8 (11th Cir. Apr. 21, 2004). An additional benefit of certiorari is the opportunity to clarify the law in this important area.

burden been adopted by a number of courts already[7] and is now routinely advanced by land use regulators seeking to avoid RLUIPA's protections.

For example, the Seventh Circuit's standard would preclude a RLUIPA claim against a municipality that arbitrarily mandated a large reduction in the size of a proposed chapel. Even if the proposed structure were fully compliant with objective zoning standards and even if the reduction significantly inhibited religious exercise, the bare fact that parishioners could still worship in a smaller chapel would preclude any judicial review whatsoever under the Free Exercise Clause or RLUIPA. Moreover, no matter how great the religious hardship and how arbitrary the reasons, under the Seventh Circuit's standard the municipality could simply deny the application altogether as long as it left open at least one other place to build "within the regulated jurisdiction." Pet. App. 13a. RLUIPA would not even be triggered.

The decision below reduces the First Amendment's free exercise guarantee and RLUIPA's powerful safeguards against arbitrary land use regulations into an easily satisfied technicality that regulators not make a religious practice effectively impossible within an entire jurisdiction. This approach vitiates essential protections for religious land use and will result in the abridgment of basic religious freedoms. In fact, that is already occurring even outside the Seventh Circuit as courts adopt its standard. In the West Linn Oregon situation described above, for instance, the Court of Appeals of Oregon ultimately rejected the church's RLUIPA claim based on the Seventh Circuit's approach. The court held that because church members had not yet been turned away at the overcrowded meetinghouse in the neighboring town, and

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[7] *See San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004); *Konikov* v. *Orange County, Fla.*, 302 F.Supp.2d 1328, 1344-45 (M.D. Fla. 2004); *City of West Linn*, 86 P.3d at 1152-53, 1157 (Or. App. 2004).

because the city had not foreclosed another application, the church's religious exercise was not substantially burdened. *City of West Linn*, 86 P.3d at 1156-57 (relying on the Seventh Circuit's decision).

This Court's review is necessary to address an issue of fundamental importance to religious organizations across the nation.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE INTOLERABLE CONFUSION AND CONFLICTS IN THE LOWER COURTS OVER THE MEANING OF "SUBSTANTIAL BURDEN" UNDER THE FREE EXERCISE CLAUSE AND RLUIPA.

A. The Lower Courts Are Deeply Conflicted Over What Constitutes a "Substantial Burden," with Courts Generally Divided Between High- and Medium-Threshold Standards.

To make matters worse, widespread confusion exists in the lower courts as to what constitutes a substantial burden on religious exercise, with standards and formulations varying greatly from case to case. Numerous lower courts have noted the confusion in their attempt to define the proper standard. See, *e.g.*, *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 507 (1997); *Hicks* v. *Garner*, 69 F.3d 22, 26 (5th Cir. 1995) (reviewing different approaches of the circuit courts).[8] Generally, the lower courts are divided between high-threshold and moderate-threshold standards for satisfying the substantial burden requirement.

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[8] *See also, e.g., Guru Nanak Sikh Soc. of Yuba City* v. *County of Sutter*, No. S-02-1785, slip op. at 24 (E.D. Cal. Nov. 19, 2003) ("It is easy to identify these general principles [regarding substantial burden], as explained by the appellate courts; it is far more difficult to discern what they mean in the real world or apply them to real facts.").

On the high-threshold side, the Seventh Circuit in its decision below held that a regulation must "direct[ly], primar[ily], and fundamental[ly]" render religious exercise "effectively impracticable" anywhere in "the regulated jurisdiction generally." Pet. App. 13a. As explained, this is an exceptionally difficult standard to satisfy in the land use context. The Ninth Circuit has essentially adopted the Seventh Circuit's test based on dictionary definitions. See *San Jose Christian College*, 360 F.3d 1024, 1034-35. The Second Circuit takes a slightly different tack, holding that a law substantially burdens religious exercise only when it "denies" or "drastically restrict[s]" the "ability" to exercise religion. *Rector, Warden & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990). And despite this Court's teaching in *Employment Division* v. *Smith*, 494 U.S. 872, 886-87 (1990), that courts cannot weigh the significance of particular religious practices, the D.C. Circuit continues to analyze "the importance of a religious practice when assessing whether a substantial burden exists." *Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir.) (analyzing whether the burden impacts a "'central religious belief or practice'"), *reh'g denied*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (reasserting appropriateness of "importance" analysis under RFRA/RLUIPA).

On the moderate-threshold side, the Fifth, Tenth and Eleventh Circuits and the Washington Supreme Court employ much more lenient tests. Consistent with this Court's decisions in *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), and *Thomas* v. *Review Board of Indiana*, 450 U.S. 707, 717-18 (1981), these courts hold that a substantial burden is "pressure" that "*tends*" (*Midrash Sephardi, Inc.* v. *Town of Surfside*, ___ F.3d ___, 2004 WL 842527, at *9) or has a "'*tendency*'" (*Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (citation omitted and emphasis added)) to force adherents to forego religious precepts or act contrary to religious beliefs. Instead of having to prove a drastic

restriction or near impossibility, it is enough that government "significantly inhibit or constrain," "meaningfully curtail," or deny "reasonable opportunities" for religious exercise (*Thiry*, 78 F.3d at 1495 (internal quotation omitted)); or that it make religious assemblies "relatively inaccessible within the city limits" (*Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988)); or even that it impose a "*financial* burden on religious activity," for example, "grossly diminish[ing] the value of the church's principal asset." *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 183-85 (Wash. 1992) (emphasis added).

Of particular note, after the filing of the petition, the conflict identified in the petition was significantly sharpened by the Eleventh Circuit's subsequent decision in *Midrash Sephardi, Inc.* v. *Town of Surfside*, ___ F.3d ___, 2004 WL 842527 (11th Cir. Apr. 21, 2004).[9] The Eleventh Circuit expressly rejected the high-threshold standard for substantial burden adopted by the Seventh Circuit in the decision below on the ground that it is inconsistent with RLUIPA: "[W]e decline to adopt the Seventh Circuit's definition" of substantial burden because it "would render [RLUIPA] § b(3)'s total exclusion prohibition meaningless." *Id.* at *9.[10] Instead, the Eleventh Circuit adopted its own version of a moderate-threshold test: "[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her

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[9] Again confirming the confusion that exists in the lower courts, *Midrash Sephardi* appears to represent a shift from the Eleventh Circuit's prior "substantial burden" stance. *Cf. Grosz* v. *City of Miami Beach*, 721 F.2d 729, 730 (11th Cir. 1983).

[10] RLUIPA's exclusion provision, 42 U.S.C. § 2000cc(b)(3), provides: "No government shall impose or implement a land use regulation that – (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Id.*

B. In the Religious Land Use Context, Conflicting Substantial Burden Standards Produce Different Substantive Results Even Under Closely Analogous Facts.

Because the outcome of the substantial burden analysis often determines whether a land use decision is subject to judicial scrutiny under the free exercise clause or RLUIPA, conflicting standards inevitably produce conflicting substantive results in an area of the law that is vital to religious organizations. For instance, the Seventh Circuit below held there was no substantial burden as long as churches could locate somewhere else in Chicago, even if the alternative facility was inconvenient or inadequate. In contrast, the Fifth Circuit in *Islamic Center of Mississippi*, 840 F.2d at 299, employing a moderate-threshold test, held that making religious assemblies even "relatively inaccessible within the city limits" created an "obvious[] burden [on] the exercise of religion."[11]

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[11] Similarly, several district courts applying the moderate approach have found a substantial burden under RLUIPA even though churches operated *existing* facilities. *See Castle Hills First Baptist Church* v. *City of Castle Hills*, ___ F.Supp.2d ___, 2004 WL 546792, *9 (W.D. Tex. Mar. 17, 2004) (finding substantial burden in city's denial of permit to use an unoccupied fourth floor of church building for Sunday school); *Westchester Day School* v. *Village of Mamaroneck*, 280 F.Supp.2d 230, 241-42 (S.D. N.Y. 2003), *appeal docketed*, No. 03-9042 (2d Cir. Oct. 8, 2003) ("It is the burden on the quality of religious education that concerns us here. While it is true that the students of WDS [a Jewish school] may still, without the special permit modification gather to pray and be educated, their religious experience is limited by the current size and condition of the school buildings. Moreover, WDS should be able, within reason, to accommodate the growing number of students who wish to pursue a Jewish education at WDS.") (internal citations omitted);

In practice, which test a court uses to assess substantial burden typically predetermines the outcome. It is noteworthy that *no* court applying the high-threshold test has ever found a substantial burden in the land use context, whereas courts applying the moderate-threshold test may or may not find substantial burden depending on the facts. See *Midrash Sephardi*, ___ F.3d ___, 2004 WL 842527, *9 (no substantial burden); *Thiry*, 78 F.3d at 1495-96 (same); *Islamic Ctr.*, 840 F.2d 298-99 (finding undue burden); *First Covenant*, 840 P.2d at 183-84 (finding impermissible burden).

The difference lies in the nature of the inquiry. Because the high-threshold standard probes only for outright preclusion, near impossibility, or some sort of drastic restriction, a simple showing of a theoretical alternative land use site (an actual, suitable alternative site is almost never available or the church would not be litigating) will generally end the analysis. Once that is found, the burden and inconvenience to the church are deemed virtually irrelevant. On the other hand, the moderate-threshold standard requires a more nuanced, fact-intensive analysis to determine whether the regulation actually imposes a bona fide religious hardship on the claimant, *i.e.*, whether it meaningfully curtails or makes significantly more costly religious exercise.[12] When the test severely constricts the facts a trial court may consider in this initial inquiry – as in

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Cottonwood Christian Center v. *Cypress Redev. Agency*, 218 F.Supp.2d 1203, 122-27 (C.D. Cal. 2002) (finding substantial burden in denial of permit to build a larger worship site because applicant, which already operated a smaller facility, showed "a religious need to have a large and multi-faceted church"); *Murphy* v. *Town of New Milford*, 289 F. Supp. 2d 87, 113 & n.29 (D. Conn. 2003) (holding that an order capping those who could gather for home-based prayer meetings constituted a substantial burden).

[12] Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1216 (1996) ("The very concept of a substantiality test implies a subjective weighing process. Judicial inquiry under a substantiality test must therefore be subjective if courts are to be sensitive to different contexts.").

the Seventh Circuit's high-threshold test – religious land users have little if any chance of prevailing under RLUIPA.

In short, the doctrinal and theoretical conflicts set forth above and in the petition result in starkly conflicting outcomes in religious land use cases. Under the standard established by the Seventh Circuit below and the Ninth Circuit, a church's RLUIPA claim will nearly always fail even when a religious hardship is the result of an arbitrary regulation. However, in the Fifth, Tenth, and Eleventh circuits and in the State of Washington, under identical facts, a church's showing of religious hardship will result in a successful RLUIPA claim. This intolerable conflict, which must ultimately be resolved by this Court, will only grow as ever more RLUIPA cases wend their way through the federal and state courts. This Court's review is richly warranted.

C. The High Threshold Established by the Decision Below Conflicts in Principle with this Court's Prior Decisions and Teachings Concerning Substantial Burden.

Lastly, this Court's prior free exercise decisions have not required that religious exercise be precluded or rendered practically impossible but rather (as noted above) that government action create a non-trivial religious hardship. As explained in the petition, the Seventh Circuit's creation of such an onerous substantial burden test creates fundamental tension with this Court's free exercise decisions.

Indeed, the decision below is flatly contrary to the key assumptions underlying this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872, 885 (1990). In *Smith*, this Court described the substantial burden requirement as merely one of "religious hardship," a formulation it later reaffirmed in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 537 (1993) (strict scrutiny applies when a regime of "individualized exemptions" is not extended "to cases of 'religious hardship'"). This Court's moderate-threshold test

for substantial burden was central to the holding in *Smith*. *Smith* was based on this Court's view that, because the substantial burden test is relatively easy to satisfy, neutral laws of general application must be evaluated under a more deferential test than strict scrutiny, lest the federal courts continuously be placed in the untenable position of dispensing religious-based exemptions to innumerable general laws. *Smith*, 494 U.S. at 885. In other words, it was precisely because of the moderate threshold of the substantial burden standard that this Court was reluctant to open up all neutral and generally applicable laws to strict scrutiny review.

Where strict scrutiny continues to apply, however – such as where laws require individualized assessments – these concerns are not implicated. In those contexts, it makes no sense for the substantial burden test to be as strict as the Seventh Circuit's approach. In fact, the standard articulated below would turn *Smith* on its head. It makes the substantial burden requirement so onerous that even those regulations that *Smith* recognizes as subject to the substantial burden/strict scrutiny standard would be effectively immune from challenge in all but the most extreme cases.

The Seventh Circuit's approach conflicts with the most basic assumptions of this Court's modern free exercise decisions. This Court should grant review to resolve this important doctrinal conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VON G. KEETCH*
ALEXANDER DUSHKU
MATTHEW K. RICHARDS
KIRTON & MCCONKIE
60 East South Temple
Suite 1800
Salt Lake City, Utah 84145
(801) 328-3600

Counsel for Amici Curiae

* Counsel of Record

May 7, 2004

ADDENDUM

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American Jewish Congress is an organization of American Jews founded in 1918 to protect the religious, political, civil, and economic rights of American Jews. It has taken a special interest in religious liberty issues. Its legal staff played a significant role in drafting RLUIPA.

Baptist General Conference ("BGC") is an association of 1,005 Baptist churches located throughout the United States. Many of BGC's affiliated churches are new, and many others are growing. As BGC churches have sought zoning approval for new property acquisition or the expansion of existing church sites, they have received varying responses from local governments. BGC would welcome this Court's clarification of the rights of churches under the Free Exercise Clause of the First Amendment and RLUIPA.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with over twelve million members worldwide. Due to rapid growth, the Church has an active program for constructing temples and chapels. In the course of its building program, the Church frequently encounters the types of land use problems at issue in this case. Although many local officials work with the Church in good faith to address legitimate land use concerns, the Church often confronts arbitrary or discriminatory land use decisions. In the Church's experience, a proper interpretation of RLUIPA's substantial burden test is essential to ensure that land use regulations are administered consistent with genuine respect for religious liberty. Moreover, the Church provided testimony to Congress during hearings which led to the enactment of RLUIPA. It has an interest in courts interpreting RLUIPA in a manner that comports with congressional intent.

Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The

ELCA has approximately 11,000 member congregations, which in turn have approximately 5.1 million individual members nationwide. Through the adoption of social statements by the ELCA Churchwide Assembly, the church's highest legislative body, the ELCA adopts policy positions on issues of public importance. Through the Lutheran Office of Governmental Affairs in Washington, D.C., the ELCA engages in advocacy on public policy issues before the Congress of the United States of America. The ELCA supports an interpretation of RLUIPA that provides effective protection for religious land uses against arbitrary and discriminatory regulations.

General Council on Finance and Administration of the United Methodist Church ("GCFA") is a national agency of The United Methodist Church that supports local churches with financial and property administration issues. GCFA is regularly called on by local United Methodist churches for advice and assistance in situations where local governments are blocking improvements or construction of United Methodist churches for reasons which appear to be an unreasonable burden on their right and ability to congregate and practice their religion. GCFA has found that these burdens are often supported by pretextual decisions concerning land use or traffic patterns. It believes this case could substantially affect the power of local governments to limit the right of United Methodists to practice their religion in the communities where they live.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. In their efforts to construct houses

of worship, its congregations have been subjected to arbitrary and discriminatory land use regulations. This brief is consistent with the policies adopted by the General Assembly regarding the religious liberty guarantees of the First Amendment. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 54,000 congregations with more than 12.8 million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,600 congregations in the United States with more than 918,000 members. As a growing denomination in a multitude of political jurisdictions, each with its own zoning laws and ordinances, the Seventh-day Adventist Church would welcome Supreme Court clarification of its rights under RLUIPA and the federal Constitution.

First Jurisdiction of Illinois, Church of God in Christ is an affiliation of 115 churches with over 15,000 total members. Its mission is to spread the Gospel of Christ, and to partner with community-based social service providers to improve the spiritual climate and the health and well-being of the communities where its churches are located. Its churches occupy a variety of buildings, from storefronts to newly-built churches. Some of its members have encountered a variety of challenges related to local land use regulations, and it strongly supports the protection of religious liberty in the land-use context. As a predominately African-American denomination,

First Jurisdiction-Illinois supports this brief to limit the excessive discretion given to local zoning boards. Too often that discretion appears to be used consciously and subconsciously to discriminate based on race.

Foundation for the Preservation of the Mahayana Tradition ("FPMT") is an international network of Tibetan Buddhist organizations in the Gelugpa tradition. A central entity that coordinates certain activities of FPMT's many affiliates in the USA and abroad is Foundation for the Preservation of the Mahayana Tradition, Inc., the Spiritual Director of which is Lama Thubten Zopa Rinpoche. There are at present approximately 130 centers worldwide affiliated with FPMT, thirteen of which are in the United States and which include centers for Buddhist studies, retreat centers, monasteries and nunneries, hospices, elementary schools, and more. FPMT owns property in various locations in the United States. Participating in Buddhist ceremonies, services, meditation retreats, and other religious events, which take place in retreat centers, meditation cabins, temples, and other buildings of religious importance on these properties, is central to Buddhist practices. However, FPMT has struggled with local government officials over building permits to develop needed buildings on its properties. Thus, FPMT has a strong interest in the preservation and strengthening of the protections intended under RLUIPA, including clarity on the application of the "substantial burden" test.

International Church of the Foursquare Gospel ("ICFG") was established in 1927 to propagate and disseminate the principles of Christianity embraced in the Foursquare Gospel. As a hierarchical church, the ICFG operates Foursquare Gospel churches in the United States, and around the world. As of the year 2003, there were 1,888 Foursquare churches in the 50 states of the U.S. having 235,852 members and 4,879 credentialed ministers. There are over 5 million adherents worldwide attending some 32,000 Foursquare churches. In the operations of its many churches, ICFG is a landowner and

builder of church related structures in many communities across the country. In many additional communities, ICFG is a tenant user of properties owned by others. In both capacities, ICFG has been subject to and complied with local land use laws, zoning laws, and building and safety codes, though with increasing difficulty. Unfortunately, ICFG's experience has been that such laws are not infrequently administered in a manner which, in its view, reflects a bias against religious organizations and their activities. As a U.S. based church comprised largely of American citizen congregants, ICFG is increasingly concerned about the erosion of religious liberty that it perceives. With the passage of RLIUPA, ICFG was cautiously optimistic that the erosion of religious liberty with respect to property rights had been stemmed. However, recent interpretations and applications of RLIUPA by some courts have seriously compromised the protections ICFG believes the Congress intended to provide by RLIUPA. The questions presented in this case put the issue squarely to the fore. ICFG's concern and its perceived duty as citizens prompt its interest and involvement in this brief.

Union of Messianic Jewish Congregations, founded in 1979, is an affiliation of 90 congregations worldwide committed to pooling their resources to establish Jewish congregations that affirm Jesus as Messiah. Like all religious organizations, it recognizes the need for its faith community to gather together, in its case to further the initiation, establishment, and growth of Messianic Jewish Congregations and to aid in causes of the Jewish people worldwide. Its congregations – ranging from small, home-based groups to large communities of several hundred members – have confronted land use restrictions that seriously inhibit its religious mission.

Worldwide Church of God began in the early 1930's in Eugene, Oregon. In 1947, it was incorporated in California, where it maintains its worldwide headquarters. The Church

has congregations throughout the United States and affiliate churches in many foreign countries. The Church owns property at its headquarters site and in other parts of the United States. The Church has encountered in the past, and anticipates encountering in the future, conflicts with governmental officials over building codes and regulations, zoning, and related issues. The Church has a poignant interest in the preservation of RLUIPA in order to have a vehicle by which it can adjudicate arbitrary and capricious governmental conduct regarding the use of its properties.